UNITED STATES OF AMERICA	}	**Disposition of Prosecution Motion for Reconsideration P 001**
v.	}	
OMAR AHMED KHADR a/k/a "Akhbar Farhad" a/k/a "Akhbar Farnad" a/k/a "Ahmed Muhammed Khahi"	}	**29 June 2007**

1. Overview. This disposition comments upon the Prosecution Motion for Reconsideration (Appellate Exhibit (AE) 017) of the undersigned's ruling on 4 June 2007 (AE 015), which dismissed the charges against the accused without prejudice.

a. Having reviewed and considered the government motion, as well as the matters presented, both in writing and orally, at the 4 June 2007 session, the Commission determines that the prosecution has produced nothing in AE 017 to show that the facts have changed or that the law has changed since the Commission made its ruling on 4 June 2007. Consequently, the Commission declines the opportunity to reconsider its ruling. In light of the government's motion, the Commission elects to clarify and make clearer the rationale for its 4 June 2007 ruling. Further, in the event that an appellate court might determine that an appeal can be taken from either the 4 June 2007 ruling or from this disposition, the Commission provides detailed rulings on the procedure and the merits herein.

b. The Commission is making this disposition without any defense response to the Prosecution Motion for Reconsideration. While the detailed defense counsel stated on 15 June 2007 that the defense intended to submit a response, the detailed defense counsel advised the Commission on 20 June 2007 that no response would be submitted. (*See* AE 022.)

2. Request for relief. As a preliminary matter, the request for relief (to extend the deadline for timely filing an appeal), improperly placed in Footnote 1 of the motion (*See* RC 3.4), was disposed of on 8 June 2007, within 70 minutes of receipt of AE 017. (*See* AE 018.) The Military Judge has no authority to toll or delay the requirements imposed by the Military Commissions Act of 2006 (M.C.A.) or the Manual for Military Commissions (M.M.C.) (*See Bowles v. Russell*, S.Ct., 14 June 2007.) The Military Judge can not and does not decide whether or not an appellate court should rule that an appeal from either the 4 June 2007 ruling or this disposition is timely under the pertinent provisions of the M.C.A. and the M.M.C., or the Rules established by the Court of Military Commission Review, or the Federal Rules of Appellate Procedure.

3. Procedural grounds. The Government asserts as a ground for reconsideration that it did not have a proper opportunity to brief the matter, argue it, and to present evidence.

a. Notice and opportunity to brief.

(1) In paragraph 6a of the motion, the prosecution states that "…the Military Judge decided this bedrock legal question without inviting briefing from the parties." This is a true statement, but it says nothing about the Military Judge offering or allowing the parties to brief the issue.

(2) On 25 May 2007, Ms. Natalie Bley, Military Commissions Trial Judiciary, at the direction of the undersigned Military Judge, sent a copy of the trial script to parties for both sides. The 13th, 14th, and 15th lines of that script contain the following words for the Prosecutor to state in open court:

"The determination by the Combatant Status Review Tribunal (CSRT) that the accused has been determined to be an alien unlawful enemy combatant has been marked as AE ___."

The prosecution is the proponent for jurisdiction over an individual in any case. In this case, the prosecution was alerted well ahead of time that it was going to be required to state in open court that there was a CSRT determination that the accused was an alien *unlawful* enemy combatant. Such a determination was not presented.

(3) On 3 June 2007, a Rules for Military Commissions (R.M.C.) 802 conference was held at NAS Guantanamo Bay, Cuba (Guantanamo). The prosecution was present. As the transcript (pp. 9-10) of the 4 June 2007 trial session shows, the prosecution was advised during the R.M.C. 802 conference that the Military Judge was going to raise the issue of jurisdiction *sua sponte*. The Military Judge discussed with the parties the question of which counsel would be arguing the motion for a given party. The prosecution did not request a continuance or any delay to brief the issue - either at the R.M.C. 802 conference or at the 4 June 2007 session.

(4) The undersigned notes that a jurisdictional issue closely akin to the one in *Khadr* was briefed and argued in the case of *United States v. Hamdan* - which also was heard on 4 June 2007. The prosecution in *Khadr* did not request to use the *Hamdan* briefs in the *Khadr* case.

b. Opportunity to argue and present evidence. The undersigned rejects the implication that the prosecution was not allowed to present argument or evidence on jurisdiction.

(1) A review of the transcript of the 4 June 2007 session shows that the prosecution did present argument on the issue of jurisdiction. A review of the transcript

of the 4 June 2007 session also shows that the prosecution did not make a formal offer of proof concerning any of the evidence which it now proposes be used.

(2) During the prosecution argument on the issue of jurisdiction (transcript, pp. 10-17), the prosecution, on page 17, stated that the government was prepared to prove that the accused is an unlawful enemy combatant (*See* page 12 of the transcript for a greater description of what evidence the prosecution was prepared to offer). However, the prosecution did not offer this proof that was referred to.

(3) The Military Judge offered the prosecution the opportunity to present matters and no motion was made and no offer of evidence or proof was made by the prosecution. (*See, e.g.*, transcript, p.16, lines 1 - 4 and p. 22, line 14.)

c. Ruling as to procedural issues. In its Motion for Reconsideration, the government presented no new law, facts, or argument which were not presented, or fairly raised, or implied in its argument on 4 June 2007. Further, the prosecution presented no evidence or facts which the prosecution did not have the opportunity to present at the 4 June 07 session. The only factual issue - the written CSRT finding - is not disputed, as shown by AE 011. Having presented no new law and no new facts, there is no basis to reconsider and the Military Judge declines the opportunity to reconsider the 4 June 07 ruling.

4. Ruling on the merits of the motion. Notwithstanding the ruling in paragraph 3c above, the Commission is also making a ruling on the merits of the government's Motion for Reconsideration. It makes this ruling in the interest of conserving judicial and other resources should the Court of Military Commission Review or the United States Court of Appeals for the District of Columbia Circuit (DC Circuit Court) decide the ruling in paragraph 3c is incorrect.

a. In Paragraphs 6d thru 6r of its motion, the government appears to assert that the Military Judge was unaware of his authority to determine his jurisdiction in the case. In subparagraph 6i, the government directs the Military Judge's attention to R.M.C. 201(b)(3) - "A military commission always has jurisdiction to determine whether it has jurisdiction." This entire line of argument is confusing given the ruling complained about by the prosecution in this case. The Military Judge determined that he had jurisdiction to decide jurisdiction. He then decided that the Military Commission did not have jurisdiction. The written order is entitled "Order on Jurisdiction" (AE 015).

b. The law of a Military Commission has a hierarchy. The authority to convene a Military Commission, and many of the procedural aspects, are set out in the M.C.A. The R.M.C., as well as decisions of the Convening Authority and other rules and regulations, must be consistent with the M.C.A. Conflicts must be resolved in favor of the M.C.A.

c. The M.C.A. makes clear that only certain persons may be tried by a Military Commission, and those persons must be alien *unlawful* enemy combatants. This makes sense in light of certain requirements of international law -- lawful enemy combatants

must be tried by other types of tribunals. The term “unlawful” is not excess baggage and it is not mere semantics; it is a critical predicate to jurisdiction.

d. In Section 948d of the M.C.A., Congress provided:

‘‘(c) DETERMINATION OF UNLAWFUL ENEMY COMBATANT STATUS DISPOSITIVE.—A finding, whether before, on, or after the date of the enactment of the Military Commissions Act of 2006, by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense that a person is an unlawful enemy combatant is dispositive for purposes of jurisdiction for trial by military commission under this chapter."

(1) In addition, Congress specifically noted, in the jurisdictional statute, that a Military Commission could try an unlawful enemy combatant but it could not try a lawful enemy combatant. (10 USC Sec. 948d - Jurisdiction of Military Commissions)

(2) While the government did have available a CSRT determination for the accused, there was no CSRT determination presented at the 4 June 07 hearing finding that the accused was an *unlawful* enemy combatant. This means the existing CSRT determination was deficient in that there was an incomplete determination to establish jurisdiction. A CSRT determination that does not comport with what Congress directs cannot serve to fulfill the Congressional mandate.

(3) The government asserts that the Military Judge can serve as “another competent tribunal” (Sec. 948d(c)). This assertion simply belies logic for the following reasons:

(a) While it would appear that the government will have to prove beyond reasonable doubt at trial facts which could establish that the accused was an unlawful enemy combatant, the M.C.A. requires the determination be made in advance for there to be jurisdiction to refer charges against the accused. This is what Congress directed, and the Military Judge lacks authority to ignore this mandate.

(b) Congress knew that it was writing a statute about Military Commissions when the M.C.A was drafted and passed. No issue is more dispositive or important to any court or tribunal than whether or how that court or tribunal has jurisdiction. If Congress had wanted the Military Commission to be included in the category of entities authorized to make the initial determination on jurisdiction, it could easily have written that into the statute. It did not.

(c) The Military Judge, furthermore, does not accept that the Military Commission is the type of “competent tribunal” Congress envisioned. The words “*another* competent tribunal” follow the words Combatant Status Review Tribunal - meaning a tribunal like a CSRT. While a Commission is a tribunal, as is a CSRT, a Military Commission and a CSRT have few similarities given the difference in their purpose and procedures. An Article 5 tribunal (Geneva Convention III) would be similar

to a CSRT and seems, without deciding that issue, to fall within the scope of “another competent tribunal." Fundamental fairness to an accused dictates that a statute, such as the M.C.A, can not be interpreted in such a manner that jurisdiction to try an accused is founded upon something beyond the express wording of the law. A Military Commission is a competent tribunal to do many things, but it is not the statutorily-envisioned, competent tribunal to make the required "get in the courthouse door" jurisdictional determination for the following reasons:

(i) First, *see* 4d(3)(c) above. Such an interpretation of the M.C.A. would violate the statutory requirement.

(ii) Second, such an interpretation of the M.C.A. would require the Military Judge to hold a mini-trial on the subject; something which judges understandably do not favor; especially when the panel members are going to have to consider the same facts and arguments in reaching their determinations on the guilt or innocence of the accused.

(iii) Third, such an interpretation of the M.C.A. has the potential of prejudicing the panel members in this case. The publicity which would result from the evidence introduced and the Military Judge's rulings thereon would be extremely difficult for the panel members to ignore. (*See*, for instance, the prosecutor's argument on p. 13 of the transcript concerning the matters which the government would wish to present on the issue.)

(iv) Fourth, in order for such a determination to assist the government, the Military Judge's determination would have to be effective *nunc pro tunc*. (*See* paragraphs 4f(3) and (4) below.)

(v) Fifth, such an interpretation of the M.C.A. would be substituting a military criminal law procedure for the current administrative CSRT procedures.

(vi) Sixth, the government's proposal would have the Military Commission, as a 948d(c) "competent tribunal," make a finding which would be "dispositive." Presumably this finding would be dispositive in terms of some later challenge to jurisdiction during the Military Commission proceedings. That makes no sense whatsoever. Any ruling made by the Military Judge is dispositive during the course of the proceedings - the only intelligible reading of 948d(c) is that the competent tribunal mentioned therein is that it is a tribunal (other than the CSRT) established by the President or the Secretary of Defense for the purpose of, or with an additional duty of, determining the combatant status of various parties brought before it.

(d) The Commission is familiar with the DC Circuit Court's opinion in *Hamdan v. Rumsfeld* (DC Cir., 415 F.3d 33, 2005) and the statement "(W)e believe that the military commission is such a (competent) tribunal..." to determine Hamdan's Prisoner of War status; a determination analogous to the unlawful enemy combatant determination required for initial jurisdiction under the M.C.A. However, as

the court went on to explain, the military commission to which it referred was one established under the President's Military Order of 13 November 2001. That military commission had three colonels sitting on it and none of those officers was serving as a Military Judge. The statement from the Hamdan decision, above, simply does not apply to a Military Commission convened pursuant to the M.C.A.

e. An obvious question is why the government must initially establish jurisdiction before trial. Certainly there are thousands of cases every day in which some accused is brought before a court (or tribunal) and the judge (or other presiding official) does not require that the government show that it has jurisdiction over the accused before the court hears the case. Why are Military Commissions under the M.C.A. different? Although there is no clear statutory directive in the M.C.A. that the government must establish initial jurisdiction before it is allowed into court, the Commission has determined that the following factors require such initial jurisdiction before the Commission can proceed:

(1) The Supreme Court held in *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006), that Common Article 3 of the Geneva Conventions applies to the trial of detainees by Military Commissions. Common Article 3(1)(d) requires that such trials be conducted by "a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

(2) While it is true that most courts do not insist upon proof of jurisdiction before starting a trial of an accused, Military Commissions are distinct and different from any other court in the United States. Moreover, often proof of jurisdiction is required in other courts. For example, in a felony court in any state in the Union, a judge would want to insure that the court had jurisdiction over the accused before starting proceedings if the accused was alleged to be from a different state, the crime alleged had occurred in a third state, and the police officials bringing the accused before the court were from yet another state. This is merely part of regular judicial procedure that becomes necessary and is utilized when required by events or circumstances.

(3) Although there is no express statutory directive that the government must establish jurisdiction before it is allowed to proceed with a Military Commission, there are clear and unambiguous indicia that Congress intended that such initial jurisdiction be established before the mechanism set up by the M.C.A. was used in the case of a given person;

(a) The statute clearly recognizes (Sec. 948d) that the class of "enemy combatant" can be divided into two categories: lawful and unlawful.

(b) The statute certainly anticipates some sort of initial challenge to jurisdiction. Otherwise, there is no reason for the insertion of Sec. 948d(c) into the M.C.A, that the unlawful enemy combatant status determination is dispositive.

(c) The statute was obviously written with knowledge of the CSRT procedures, and the statute anticipates a prior determination by the CSRT (or other

competent tribunal) that an accused would be determined to be an unlawful enemy combatant before proceedings under the M.C.A. are initiated. Otherwise, there is no reason for the use of the word "dispositive" in 948d(c) in reference to all unlawful enemy combatant status determinations.

(d) Section 948d(a) states that the M.C.A. "establishes procedures governing the use of military commissions to try alien unlawful enemy combatants. …" Section 948d states the statutory requirements for jurisdiction of Military Commissions. Section 948q outlines the swearing of "(C)harges and specifications against an accused in a military commission. …" Section 948h authorizes certain people to convene Military Commissions. Thus, logic and reason dictate that charges should not be sworn under Section 948 and charges can not be referred to a Military Commission for trial under Section 948h unless there is jurisdiction under Section 948d, because Section 948a only authorizes the use of Military Commissions and the procedures established in the M.C.A. when dealing with an unlawful enemy combatant. This conclusion is further buttressed by the fact that "lawful" enemy combatants can never be tried by a Military Commission, should be excluded by a proper CSRT at the front end of the process, and should never be subjected to the Military Commission system or process.

(e) Reading the provisions of Section 948d of the M.C.A. in conjunction with Section 1005 of the Detainee Treatment Act of 2005 (DTA) (P.L. 109-148 Dec 30, 2005 119 STAT. 2739), it is evident that Congress was well aware of the CSRT process and that Congress expected that the CSRTs would determine the status of all detainees at Guantanamo. Further, reading the two sections together, it is apparent that Congress knew what the standards were for the CSRT, expected that the CSRT would have its standards modified to meet the requirements of the M.C.A., and that "lawful" enemy combatants would not be subject to the Military Commission process.

(f) The intent of Congress becomes even clearer when one considers the history of the CSRT process. On 29 June 2004, the Supreme Court ruled in the cases of *Rasul v. Bush*, 542 U.S. 466 (2004), and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). *Rasul* held that federal courts had jurisdiction to hear habeas claims from detainees at Guantanamo. (Rasul was an alien detainee at Guantanamo.) In *Hamdi*, the plurality opinion stated that some sort of military hearing on detention might give Hamdi, an American citizen, all of the necessary protections to which he was entitled and further intimated that habeas courts should give some sort of deference to a military hearing set up to determine whether detention was proper. In response, the Deputy Secretary for Defense established the CSRT process with his order of 7 July 2004 (AE 014) and the Secretary of the Navy, as the executive agent for the Department of Defense for CSRTs, published operating procedures on 29 July 2004 (AE 021). It was against this backdrop that Congress passed the DTA and required that all detainees at Guantanamo be given CSRT reviews. *See* DTA, Section 1005(a)(1) and (a)(1)(A), "(T)he Secretary of Defense shall submit...the procedures of the Combatant Status Review Tribunals and the Administrative Review Boards established by direction of the Secretary of Defense that are in operation at Guantanamo Bay, Cuba, for determining the status of the detainees held at Guantanamo Bay. …" Then, in response to the Supreme Court's decision in

Hamdan, Congress passed the M.C.A. with its "dispositive" language, which expressly required the acceptance of a CSRT determination. It is clear that Congress intended that all detainees be reviewed by the CSRT process, that the CSRT separate the "unlawful enemy combatant" detainees from the "enemy combatant" detainees, and that only those detainees designated as unlawful enemy combatants by a CSRT or other competent tribunal be handled by the Military Commission process established by the M.C.A.

(4) While it is true that in normal courts-martial practice the Military Judge does not ordinarily insist that jurisdiction be shown before the case can proceed in court, there are significant differences between the jurisdiction of a court-martial and the jurisdiction of a Military Commission under the M.C.A. and there are also differences in the realities of courtroom practice. (*See, e.g.*, paragraphs 9 and 10 of AE 015.) For example, Article 2 (10 USC Sec 802) of the Uniform Code of Military Justice (UCMJ) lists twelve separate categories of personnel who are subject to court-martial jurisdiction - while a Military Judge usually expects to see active duty soldiers, a Military Judge would not be surprised to see a reservist, for instance. In contrast, under the M.C.A., a Military Commission has jurisdiction over only one specifically defined category - those persons who are alien unlawful enemy combatants. Consequently, while a Military Judge under the UCMJ generally has no reason to question her authority over a person brought before her, a Military Judge under the M.C.A. knows that the M.C.A. is to be used only for one category of persons and that determination should be made in conformity with the M.C.A. and should be available to the Convening Authority before proceedings are initiated and to the Military Judge before any initial hearing.

(5) Finally, the use of military courts, tribunals, and commissions to try civilians - and there has certainly been no allegation that Mr. Khadr is not a civilian - has faced and continues to face great disfavor in the United States. While such trials have been ratified by the federal court system on occasion, the federal courts have also been inclined to determine that military courts do not have jurisdiction or competence to try civilians. In fact, during the undersigned Military Judge's service in the Army, the Supreme Court has even strictly limited the ability of courts-martial to try active duty members of the United States armed forces. (*See, e.g., O'Callahan v. Parker*, 395 U.S. 258 (1969), *Relford v. Commandant*, 401 U.S. 355 (1971).) Given that the use of military courts to try civilians is not favored, Congress could not have intended the logical, if unintended, result of the government's argument and position in this case: the military can seize whomever it wants, charge them, refer them to trial by Military Commission, and only then, after the Commission has been called to order, will the initial question of jurisdiction in accordance with the M.C.A. be resolved.

f. A brief summary of the pertinent substantive matters follows:

(1) On 4 June 2007, the Military Judge was presented with two documents. The charge sheet (AE 001), on its face, contained a bare allegation that Mr. Khadr was an unlawful enemy combatant. Because the CSRT finding (AE 011) was that Mr. Khadr was an enemy combatant, not an *unlawful* enemy combatant, the CSRT finding (AE 011) does not support trial of Mr. Khadr by a Military Commission.

(2) The prosecution was aware of this failure of the CSRT finding to establish jurisdiction based on the paperwork in the case. The Military Judge raised the issue of jurisdiction *sua sponte* and the prosecution was given an opportunity to argue on the matter and present evidence.

(3) The prosecution presented no evidence of any prior determination of the status of the accused other than the CSRT and the President's Memorandum of February 2002 (AE 013).

(4) In the Motion for Reconsideration, the prosecution has still not presented any evidence of any prior determination of the status of the accused other than the CSRT and the President's Memorandum of February 2002.

(5) Instead of offering a CSRT that met the jurisdictional standards required by the M.C.A., the government insisted, both in argument on 4 June 2007 and in its motion, that:

(a) The CSRT and the President's Memorandum established jurisdiction, or, alternatively;

(b) The Military Judge is a competent tribunal to determine jurisdiction and should hear evidence to do so.

(6) The Military Judge does not find that the CSRT and the President's Memorandum establish jurisdiction;

(a) The CSRT determination was made for purposes of determining continued detention of Mr. Khadr; not for purposes of determining jurisdiction for trial by a Military Commission.

(b) The CSRT finding applied and used a different standard for enemy combatant than the M.C.A. definition of unlawful enemy combatant.

(c) The CSRT preceded the enactment of the M.C.A. by two years and the enactment of the DTA by one year.

(d) The President's Memorandum was not an individualized determination concerning Mr. Khadr.

(7) The Military Judge does not find that the Commission is a competent tribunal to establish initial jurisdiction. (*See* 4d(3) above.)

(8) Having received no evidence of a prior determination that the accused is an *unlawful* enemy combatant, and having received evidence that a statutorily

recognized tribunal found that the accused was an enemy combatant, the Commission finds that initial jurisdiction to try the accused has not been established.

(9) The Military Judge adheres to and incorporates by reference his written order of 4 June 2007 (AE 015).

g. Ruling. Assuming, *arguendo*, that the disposition of the Motion for Reconsideration on procedural grounds in paragraph 3c is erroneous, the Military Judge denies the Motion for Reconsideration on the merits as outlined in this paragraph.

Peter E. Brownback III
COL, JA, USA
Military Judge